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IN THE

Supreme Court of the United States

October Term, 1970

No. 825

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

Honorable IRVING BEN COOPER, United States District Judge for the Southern District of New York,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY MEMORANDUM

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The briefs in opposition to certiorari confirm the merits of the petition for certiorari.

Itkin's brief

Herbert Itkin's brief in opposition to certiorari asserts that the "State of New York has not shown, and cannot show, any prejudice to its interest in the situation presented here" (p. 14). In so urging, Itkin misconstrues the standards of removal. To obtain trial of a state prosecution in

a state court, local authorities are not required to show that a fair trial of the indictment is impossible in a federal court, or that other prejudice will occur. The "prejudice" in improper removal is the inherent violation of the constitutional division between state and federal authority. Under the Constitution of the United States, a federal court presumptively has no jurisdiction to try a state charge. The founding fathers, in their wisdom, constructed a federal form of government, and there is inherent prejudice to federalism in trying state indictments in federal courts. Hence, the trial of a state charge in a federal court should not be a preliminary examination into the merits of the removal petition. For to justify even the trying of the case in a federal court, the defendant must have overcome the presumptive unconstitutionality of asserting federal jurisdiction over state criminal charges. To overcome this prima facie violation of the Constitution, the state defendant is obliged to show clearly and specifically that an overriding federal interest justifies removal. As the petition for certiorari demonstrates, that has not been shown here.

Although the state is not obliged to show prejudice to its prosecutions, we have pointed out in the petition the District Court's assumption that removal was a proper maneuver to delay Itkin's trial until the government was through with him as a witness (petition, pp. 29-30).

The government's brief

The government, in its brief in opposition to certiorari, tries valiantly to fill the void left by Itkin, and speculates as to possible relationships between Itkin's role as a government informer and the allegations in the state indictment. For example:

> "The activities charged in the three State indictments thus could have been a pretense made necessary under Itkin's role as an undercover agent or they could have been such as to make Itkin an actual accomplice or participant in criminal offenses" (brief, pp. 12-13).

With respect to the state indictment alleging conspiracy to commit perjury, the government conjectures that

> "Itkin can raise a defense that he could not advise Marcus to testify truthfully without risking the premature exposure of his role as a federal informant" (brief, p. 14).

But it was *Itkin's* obligation to allege these matters in his petition for removal. The government's imaginative theories presented to this Court are no substitute for a showing in the removal petition of a "causal connection" between the charged conduct and the asserted official authority (see government brief, p. 15).

As the petition for certiorari makes clear, the principles governing removal of state criminal prosecutions were set forth by this Court in *Colorado* v. *Symes*, 286 U.S. 510 (1932) and *Maryland* v. *Soper*, 270 U.S. 9, 36, 44 (1926). The government—contradicting Itkin (Itkin's brief, pp. 14-15)—suggests that the language in these cases has been "eroded" by *Willingham* v. *Morgan*, 395 U.S. 402 (1969), a civil removal case, but the petition for certiorari refutes this suggestion. This case presents an opportunity to reaffirm the principles last set forth by this Court 38 years ago in *Colorado* v. *Symes*.

Conclusion

A writ of certiorari should issue and the order of the United States Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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November 10, 1970